United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

ORIGINAL

76-1364

IN THE

United States Court of Appeals

For the Second Circuit

B P/S

UNITED STATES OF AMERICA,

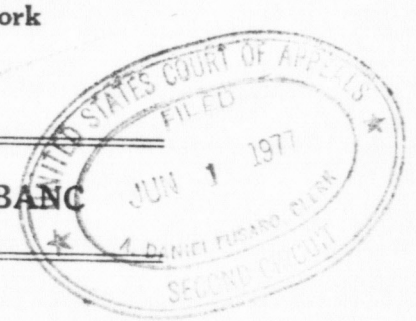
Plaintiff-Appellee,

against

EDWARD PASTOR and MARTIN WEINER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York



PETITION FOR REHEARING IN BANC

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UNITED STATES OF AMERICA,

Plaintiff-Appellee, 76-1364

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EDWARD PASTOR and MARTIN WIENER,

Defendants-Appellants.

- -

PETITION FOR REHEARING IN BANC

To the Honorable Judges of the United States
Court of Appeals for the Second Circuit:

Edward Pastor, one of the Defendants-Appellants above-named, presents this Petition, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, for a Rehearing in Banc in the above-entitled cause on which judgment was entered May 19, 1977. This appeal had been orally argued on February 22, 1977, before Mansfield, C.J. (presiding), and Van Graafeiland, C.J. and Carter, D.J.

In an opinion by Mansfield, C.J., joined in by Carter, D.J., this Court held:

(a) The defendant Pastor was not deprived of his Sixth Amendment rights as the decision of the Court below (Motley, J.) was not "clearly erroneous" in holding that the defendant Pastor had voluntarily absented himself when jury selection was about to begin, and the trial judge had not abused her discretion in proceeding with jury selection in his absence.

(b) This Court would accept -- subject to the "clear error"

rule -- the findings contained in Judge Motley's November 16, 1976 opinion below, notwithstanding that that opinion was filed subsequent to the filing in this appellate Court (pursuant to its revised scheduling Order) of the Appendix on appeal and of the Appellants' briefs.

(c) The classification by the United States Attorney General of phentermine and phendimetrazine was not made pursuant to an unconstitutional delegation of legislative power to the Attorney General.

In his dissenting opinion, Van Graafeiland, C.J., concluded:

(a) As the action below "was completely arbitrary and unwarranted," no waiver of Sixth Amendment rights could be implied from the absence of the defendant Pastor at the jury selection, the "undisputed medical evidence" having shown that Pastor's "physiological impairment [was] so severe and so serious as to excuse his absence from court." (Pastor, hospitalized for a heart seizure the morning jury selection was to begin, had long suffered from an undisputed underlying "advanced triple-vessel coronary artery disease, myocardial infarction, hypertension and severe angina pectoris.")

(b) The "clearly erroneous" test of appellate fact review should not be frustrated by the trial judge's opinion (characterized as "an additional Appellee's brief") -- purportedly premised upon evidence elicited on a hearing that was conducted months after "her own arbitrary determination" had been made to proceed with jury selection -- which opinion was handed down after the district court had lost jurisdiction of this matter and jurisdiction of this appellate Court had attached.

In support of this Petition for a Rehearing in Banc, your Petitioner relies upon the aforesaid dissenting opinion of Van Graafeiland, C.J., and asks that that opinion be deemed incorporated in this Petition. In further support, your Petitioner respectfully urges the considerations that follow:

I.

The majority of this Court, in sustaining empanelment of the jury below despite the defendant Pastor's absence, took action in conflict with those standards firmly articulated in this Circuit governing a trial court's proceeding in a

defendant's absence.

This Circuit has, during the last decade, decided a trio of cases dealing with the Sixth Amendment issue of a trial court's ability to proceed in the absence of a defendant. Those cases, United States v. Toliver, 541 F.2d 958 (2d Cir. 1976), United States v. Tortora, 464 F.2d 1202 (2d Cir.), cert. den., 409 U.S. 1063 (1972), and United States v. Crutcher, 405 F.2d 239 (1968), cert. den., 394 U.S. 908 (1969), were all cited in the majority opinion, but -- it is respectfully submitted -- were not in fact followed in the action taken by that majority.

In Toliver, supra, this Court affirmed the conviction of a defendant who was absent because of illness during a portion of the presentation of evidence. So doing, this Court there recognized the "vexatious problem" for a trial judge of adjourning a case or granting a severance, but noted that "no other course can be condoned in the absence of a waiver or misconduct by the defendant...." This Court further noted:

> "A defendant's absence during the empanelling of a jury might be too basic to be treated as harmless.... This reasoning might justify a rule that would require automatic reversal when a defendant has been denied his right to participate in the jury selection process." 541 F.2d at 964.

Overall, Toliver's message in this regard appears to be that jury selection is not to proceed absent the clearest waiver, either express or one necessarily implied.

That standard, requiring clarity in any implied waiver, had been earlier more fully considered by this Court in Tortora, supra. There, in affirming a conviction, this Court had stressed the substantial burden to be satisfied before a trial might proceed in the defendant's absence:

> "It must clearly appear in the record... that [the defendant] voluntarily, knowingly and without justification failed to be present at the designated time and place before the trial may proceed in his absence." (emphasis supplied) 464 F.2d at 1209.

This Court also noted in Tortora that no justification had been proferred for the defendant's absence in either the trial or the appellate court.*

Respectfully, we urge that the present record cannot be read as showing "clearly" that the defendant "voluntarily, knowingly and without justification" failed to appear. Had it so "clearly" appeared on May 18, 1976 -- the date the trial judge chose to proceed with the jury selection in the defendant's absence -- then the post-trial hearing on the same question, directed by the trial judge, would have been needless** as would have been the trial judge's lengthy November 16, 1976 ex post facto opinion seeking to justify her earlier action. If the voluntariness of the defendant's absence had been as "clear" as this Court apparently requires, then why the late hearing and the tardy opinion? At most, Judge Motley's September hearing and her November opinion suggest that some basis may arguably exist for ruling that Pastor's May 18th absence was "voluntary"***; the

*There, too, upon the initial failure of two of the defendants to appear, the trial court had revoked their bail, but had prudently re-set the trial date to provide an opportunity for their appearance.

**On May 18, 1976, before the trial judge moved ahead with the jury selection, the Assistant United States Attorney asked that selection be deferred "to determine whether Mr. Pastor has purposefully absented himself from court today" (A 323). Obviously, "voluntariness" did not "clearly" then appear to the Government.

***It should be clear that, along with the dissenting Judge, we urge that no such basis exists.

proceedings and opinions cannot -- in light of the clear record of Pastor's illness and the findings of the physicians on May 18, 1976 -- establish that such absence was "clearly" voluntary.

This Court in Crutcher, supra, the earliest of the three cases, stressed -- as it had in the Toliver and Tortora cases -- the Sixth Amendment importance of the defendant's presence at the jury selection ("...[T]here is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impaneling of the jury." 405 F.2d at 244).

The Second Circuit has not been alone in requiring that the voluntariness of the defendant's absence be "clearly" established. In Taylor v. United States, 414 U.S. 17, 19 n.3 (1973), the Supreme Court noted that a trial court can only proceed in a defendant's absence "if it is clearly established that his absence is voluntary" (emphasis supplied). And, as noted by the dissent here, in Illinois v. Allen, 397 U.S. 337,343 (1970) the high Court stated unequivocally that "courts must indulge every reasonable presumption against the loss of constitutional rights."

Apart from the requirement that the voluntariness of a defendant's absence be "clearly" established, a second and separate requirement for going ahead with jury selection has heretofore existed in the Second Circuit. The majority's opinion here, if allowed to stand, threatens to obliterate that second requirement. In Tortora, supra, this Court stated that even if a defendant had been "clearly" shown to have been voluntarily absent, a trial judge was only to proceed with jury empanelment in "extraordinary" circumstances. Discretion to proceed, this

Court held in Tortora, "should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant" (emphasis supplied) 464 F.2d at 1210.*

There were here no "extraordinary" circumstances -- and the Court majority here has not suggested any -- to justify having failed to postpone jury selection until more medical information concerning Pastor's attack that morning was available. The fact that prospective veniremen were on deck, that a large courtroom suitable for jury selection had been reserved, that jurors had been waiting the previous day (that earlier day, May 17, 1976, having been scheduled by the trial judge for and having been devoted to pre-trial motions), and that there had been a February pre-trial adjournment of this entire matter when Pastor was then hospitalized with congestive heart failure (verified by the Government's expert) hardly -- if "extraordinary" is to have its accustomed meaning -- justify proceeding with jury selection on the morning of May 18, 1976. Yet these appear to be the factors relied upon below, and by the majority here, as having justified the exercise of discretion to proceed with the jury selection. If Tortora is to stand, and the phrase extraordinary circumstances is to have meaning, in Banc reconsideration of the action taken here should be, we respectfully submit, directed.

*Indeed, this Court went still further, stating that "It is difficult for us to conceive of any case where the exercise of this discretion would be appropriate other than a multiple-defendant case." 464 F.2d at 1210, n.7. Respectfully, we note that in the instant situation only one other defendant existed, and not only had the prosecutor urged the trial judge to delay jury selection until an up-to-date medical report could be provided (A 323), but that single co-defendant was to join the Pastor application concerning jury selection (A 404-05).

II.

The majority of this Court, in subscribing to "the gruesome test of whether [Pastor] survived the trial" (dissent, p. 3666)* and in overlooking or misapprehending a variety of facts concerning Pastor's May 18th illness and hospitalization, may encourage trial courts improperly to endanger the health and lives of other genuinely ill defendants.

In dissenting, after noting that an ill Pastor was on his way to Mt. Sinai Hospital at the very moment the district judge ordered the case to trial, Judge Van Graafeiland reviewed the trial judge's courtroom actions of that morning:

> "...the District Judge, without any supporting medical information concerning appellant's then existing condition, decided that appellant was engaged in a 'deliberate attempt to frustrate this Court in bringing this case to trial....' She peremptorily rejected the request of appellant's attorney and the suggestion of the United States Attorney that 'a determination be made first as to whether [appellant] is in fact sick before proceeding.' She threatened appellant's counsel with contempt of court for simply attempting to ask a question. Finally, she revoked appellant's bail and ordered the United States Marshals to 'go and get him.' The District Judge's subsequent pique because the Marshal, faced with the inhumane task of forcibly removing appellant from the coronary care unit of the Mt. Sinai Hospital, failed to carry out her order, is disclosed in other portions of the record. This, my colleagues hold, constitutes proper judicial deference to the defendant's constitutional right to be present during the selection of the jury. I respectfully disagree.
>
> "The wheels of justice would not have ground to a jarring halt if the District Judge has delayed the selection of a jury for only a short time in order that appellant's counsel might secure a medical report from his client's doctor." (Emphasis in original) (pp. 3658-61).

*Page references to the Court of Appeals' opinions herein are to the slip sheet pages.

Respectfully we note that this Court's majority, in sustaining the action below, misapprehended or overlooked a number of the "facts" upon which it seemingly relied.

For example, as retroactive proof that Pastor was not seriously ill on May 18th, the majority stated that he "was physically able to attend the 12-day trial without any interruption attributable to his illness" (p. 3646), and that he "proved to be fully capable of attending and participating thereafter in the trial" (p. 3648) which started two days later, May 20th. The dissent appropriately characterized this as "the gruesome test of whether [Pastor] survived the trial" (p. 3666) -- a throwback of sorts to ancient trials by ordeals of fire, water or hot iron. In fact, however, Pastor was not fully capable of attending and participating in the trial, even on May 20th and thereafter. Removed daily from heart monitoring equipment in Mt. Sinai's coronary care unit by the United States Marshal (acting upon the trial judge's express direction), Pastor had been administered morphine at the hospital during the weeks of the trial and appeared in court sedated. He also utilized nitroglycerine medicinals regularly. At night, and even at the courthouse, he had oxygen administered. In the courtroom, he frequently dozed for extended periods. He had to leave the courtroom repeatedly while his trial continued -- not solely during recesses -- to take care of bodily functions, the build up of fluids being a concommitant to his illness. (See e.g., trial tscpt. pp. 247, 297-98, 371, 441-50, 548-50, 850-56, 1044, 1540-41, 1710-17, 2351-53; see also pp. 153-54, 193-95.) Sufficiently ill to have

been kept in Mount Sinai's coronary care unit during much of the trial -- when not in the courtroom -- wired to cardiac monitoring equipment, Pastor's trial under the circumstances might, indeed, be viewed as an exercise of inhumanity in the very halls of justice. The finding that Pastor was "fully capable of... participating" is not only irrelevent, but also an excursion beyond the facts of this record.

The majority misrelies, we submit, on Pastor's heart episodes of September 1975 and February 1976 as suggestive of malingering. The reports submitted by the Government's expert, Dr. Texon, reflect their seriousness and bona fides. Indeed, in September 1975 Pastor's condition was such that during his hospitalization Pastor underwent cardiac catheterization (an angiogram) itself a somewhat life endangering procedure. Rather than speculating that the chronological coincidence of Pastor's hospitalization with court procedures was the result of "bluff", this Court -- and the court below -- might have paid heed to the testimony of the Government's expert Dr. Texon, at the day-long February 17, 1976 hearing; Dr. Texon there noted the correlation between tension (criminal trials, clearly, can even induce tension in healthy defendants!) and such profound angina attacks and other cardiac episodes as would require hospitalization. (See February 17, 1976 transcript, pages 113,117, 132-34, 149-54; see also pp. 36-47.) Certainly, in light of this testimony, when Pastor (having been in court on Monday, May 17, 1976) was absent the morning of May 18, 1976, and the court was informed of his apparent early morning severe attack, the court had been given medical testimony from the expert upon whom it relied

that might have triggered recognition of the likely bona fides of such illness.

The majority in this Court also erred factually, we submit, in its cynical references to the confinement recommended for Pastor by his physician at the time of his February, 1976 congestive heart failure. This Court's statements that "Pastor's physician represented that several months confinement would be required" and that he was "discharged from the hospital [in two weeks] despite the representations by his physician" (p. 3640) are even contradicted by Judge Motley's November 16, 1976 opinion. More accurately summarizing the medical reports, that opinion noted (at p. 6) that both Pastor's physician and Dr. Texon, recognizing Pastor had had congestive heart failure "agreed" to a "short period" of hospitalization (which was in fact two weeks). Pastor's physician in Philadelphia (not Dr. Kuhn in New York) estimated that his convalescence thereafter -- not hospitalization -- would take "two to three months". Incidentally, although the majority also wrongly stated that "since his 1966 attack Pastor has never suffered another heart attack" (p. 3639), even the Government expert did not dispute that in February 1976 Pastor had had congestive heart failure and concomitant future risk. In his February 23, 1976 report, Dr. Texon had stated:

> "The prognosis in this case is guarded because of the unpredictability of the inherent pathological development of atherosclerosis, his underlying basic coronary artery disease. Similarly, episodes of congestive heart failure may recur because of the deminished cardiac reserve which has now become more manifest clinically." (Emphasis added)

And the preposterous idea (p. 3646, n.5) that anyone (including Pastor) would have risked a self-induced cardiac infarction is

wholly without support in the medical testimony.

With the dissent here, we urge that what was relevant in determining whether Pastor "clearly" voluntarily absented himself on May 18, 1976 were the events of that morning. But if, as the majority determined, Pastor's earlier medical history is properly considered, it should have been accurately perceived. In all, that history was clearly such that unless the trial court wished to engage in the most dangerous of games, one with considerable life endangering impact, rather than sending out the Marshals, simple prudence would have dictated seeking further information on May 18th, or at least awaiting the mere few hours that it in fact took to obtain a preliminary report from Mt. Sinai.

Both Judge Motley and the majority here made much of the fact that on the morning of May 18, 1976 Pastor's counsel attempted to get Dr. Texon to examine Pastor when purportedly Dr. Kuhn was available. Both Judge Motley and the majority here wholly ignored defense counsel's own uncontested narrative of the events of May 18, 1976. Defense counsel had initially tried to persuade Dr. Texon to see Mr. Pastor because from his "familiarity with this case... the only one whom the Court would believe would be Dr. Texon" (May 19, 1976 trspt., p. 204). When that proved unsuccessful and counsel was unable to reach the trial judge before court convened on May 18th (in order to get a direction to Dr. Texon to see Mr. Pastor), counsel sought unsuccessfully to reach Dr. Kuhn, the defense physician. When that failed initially, counsel tried -- also unsuccessfully -- to reach two other heart specialists. Ultimately he spoke with Dr. Kuhn, sometime prior to 9:00 a.m., and arrangements were made for

Pastor's hospitalization. (May 19, 1975 tscpt., pp. 203-36). Under the crisis circumstances that existed, the defendant's constitutional rights should not -- we submit -- hinge on such a flimsy consideration as the precise moment where hindsight may suggest a particular physician might have been contacted.

Both the trial court and the majority suggest that a physician's certificate should have been in court at 9:00 a.m. But neither suggest how it might have been so rapidly obtained, the episode having occurred while Pastor was dressing for court that morning. In fact, Pastor was examined at the hospital, and an affidavit procured and brought to court by 11:30 a.m.

Other factual mistakes in the majority opinion exist but will not here be itemized. The overall impression conveyed by that opinion, that the incidents of May 18th were simply the last in a series of dubiously founded defense delays is, however, demonstrably false. The pre-trial record in this case reveals the Government's entire series of abortive efforts to supersede the original indictment, which took until March 12, 1976 to produce that superseding indictment upon which the defendants were ultimately tried.

With great respect for this Court, we cannot avoid noting that the majority decision has sustained a judicial colleague's clearly heavy-handed action, doing so on the dubious basis that it was not "clear error". That decision renders forfeit the defendant Pastor's Sixth Amendment rights, and, if followed, endangers the health and possibly the lives of future defendants, as well as warps previously established sound law in this Circuit and distorts facts. Additionally, the opinion of necessity impugns the defendant's honesty, the good faith of his

counsel, and the professional judgment of the defendant's physician (the Director of the Coronary Care Unit at New York's Mount Sinai Hospital) and the professionalism of hospital personnel who found the defendant so seriously ill as to retain him under cardiac care. Indeed, the opinion even casts doubts upon the capacity of the Government's own physician who -- on the evening of May 18, 1977 -- recommended that the defendant's illness was such that at least another twenty-four hours should pass, during which defendant would remain hospitalized, before the trial might resume.

Respectfully we urge that for this Court to permit its present action to stand could encourage the trial judiciary here in believing that all else -- including health and possibly life itself -- must yield in this Circuit to the interest of bringing defendants to trial. Civilized procedures hitherto have required that bona fide reasons to believe a defendant to be quite ill, and suffering accutely debilitating pain, are not to be ignored when a matter is scheduled for trial, even if that means that prospective jurors are kept waiting.

III.

The majority of this Court, in entertaining Judge Motley's November 16, 1976 opinion and in applying the "clear error" standard to the facts found therein, is in conflict with this Circuit's earlier clear decisions specifying the loss of trial court jurisdiction during the pendency of an appeal; thereby the opinion unsoundly encourages trial judges to injudiciously participate as special advocates of sorts in the appeal process.

The appellate majority placed reliance upon Judge Motley's

November 16th opinion, filed after the Appendix and appellant's briefs had been filed pursuant to this court's revised scheduling Order of October 19, 1976. It did so stating that the trial judge had earlier advised the parties that she would draft such an opinion setting forth her findings of fact and reasoning (p. 3644, n.3). Then, referring to the content of that opinion, the majority held that "these findings, being supported by evidence of record, are not clearly erroneous" (p. 3645).

This extraordinary concept of retained jurisdiction is wholly without precedent in this Court, as noted by the dissenting Circuit Judge. The cases cited in the dissent, United States v. Warren, 453 F.2d 738, 744-45 (2d Cir.), cert. den. 406 U.S. 944 (1972), United States v. Ellenbogen, 390 F.2d 537, 542-43 (2d Cir.), cert. den. 393 U.S. 918 (1968), and United States v. Habib, 72 F.2d 271, 271-72 (2d Cir. 1934), each held unequivocally that the district court is deprived of jurisdiction once the case has left that court and the appeal is proceeding. The sole purportedly contrary authority cited by the majority, Reinstein v. Rosenfield, 111 F.2d 892 (7th Cir. 1940) is almost four decades old, from a different Circuit, and not in point.

Respectfully, therefore, we urge as did the dissenting judge that even if the November 16, 1976 opinion below is treated "as something other than an additional appellee's brief", (p. 3664), the appellate Court should not feel bound to apply the "clear error" rule in reviewing the purported findings therein.

If trial judges in this Circuit are to be dissuaded from speaking as advocates to sustain their actions when under review upon appeal, this Court should not permit infringements upon the

compelling principle that they lose jurisdiction during appeals. We respectfully submit that granting the in Banc rehearing that is sought here will permit this Court to dispel the confusion surrounding the novel concept of continuing trial court jurisdiction that has been interjected by the judge below, and will afford opportunity to re-emphasize the soundness of the rule articulated by this Court in Warren, Ellenbogen, and Habib, supra.

WHEREFORE, upon the foregoing grounds, including those set forth in the opinion of Judge Van Graafeiland, and those urged in our papers previously submitted and on file in this Court, we respectfully urge that the Petition for Rehearing in Banc be granted.

Respectfully submitted,

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Service of 2 copies of the
within Petition is hereby
admitted this 1st day of
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